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SOUTHERN DISTRICT OF CALIFORNIA

BY: *[Signature]*

DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

REYNANTE PRE,

Petitioner,

v.

VICTOR M. ALMAGER, Warden,

Respondent.

CASE NO. 07-CV-890 W (WMc)

ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS UNDER 28 U.S.C.
§ 2254

Petitioner Reynante Pre ("Petitioner"), a state prisoner proceeding *pro se*, has filed a federal Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). The Court decides the matter on the papers submitted and without oral argument. See Civil Local Rule 7.1(d.1). For the reasons outlined below, the Court **DENIES** Petitioner's request for habeas corpus relief.

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1 **I. BACKGROUND**

2 The facts are undisputed and were set forth by the Fourth District Court of
3 Appeal, Division One, in a published opinion stating the following:

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5 On March 26, 1999, G. Rose, returned to her apartment in a gated
6 community after grocery shopping. As she exited the elevator on her
7 floor, she saw Pre, whom she did not recognize, standing by the elevator.
8 She smiled at him and walked to her nearby apartment, unlocked the
9 door, took two steps inside, set down her groceries on the kitchen counter,
10 and waited for the door to "click," indicating it was closed.

11 When she did not hear the click, she turned around and saw Pre
12 opening the door. She went to the door to block him from opening it
13 further. In broken English, Pre asked, "How you get out garage?" While
14 keeping the door open only about [twelve] inches, Rose answered, "You
15 drive out the garage." Pre repeated his question or asked how to get out
16 the gate. Rose told him to go to the rental office and began to close the
17 door but Pre had his foot inside the door and resisted her closing the door.
18 He forced his way into her apartment. She stumbled backward, losing her
19 balance, as he entered.

20 As soon as she regained her balance, Rose kicked Pre in the groin,
21 which slowed him momentarily. Rose testified there was "a major scuffle"
22 while they were both standing. He began to choke her and she responded
23 by trying to choke Pre or gouge his eyes. She then tripped or fell to the
24 floor, landing on her back with Pre over her. He continued to choke her
25 with one hand while he reached behind his back and pulled out a weapon
26 with his other hand. The weapon was later determined to be a car club (a
27 steering wheel locking device).

28 Pre would have hit Rose's left temple with the car club if she had
not put up her left hand to deflect the blow and to try to grab it. Pre
wrested the car club from Rose by pulling it in a backward motion; as he
did so, the car club came apart and part of it flew off.

Pre grabbed Rose's hands and dragged her down the hall so they
could not be seen through a nearby window. Rose was kicking and
struggling. Pre continued to choke Rose until she lost consciousness.
When Rose regained consciousness, Pre had her shoulders and head
cradled in his lap area, her head elevated and he was biting her right ear.
Rose began struggling again but Pre applied pressure to her throat until she
passed out again. Rose was afraid Pre was killing her, believing, "Why
would anybody choke somebody out twice if it were not to kill someone?"

When Rose regained consciousness, Pre had left the apartment and
she crawled to the phone and called 911. She later discovered her purse
was missing.

As a result of Pre's attack, Rose testified she suffered an injury to
her right temple, a fracture of her cheek which caused dental problems, a
bite mark on her right hand, fractured ribs on her left side, an injury to an
internal organ, a fracture of her left little finger that was later amputated,

1 and a bite to her right ear, which required over 100 stitches. The
2 photographic exhibits of Rose's injuries additionally show a serious of five
3 round bruises between her breasts, bruising on her back and what appears
4 to be a bite mark on her back.

5 On April 1, 1999, Pre fled to the Philippines (the country of his
6 birth and where he had lived before coming to the United States in 1994)
7 because he was afraid he might be prosecuted for the attack. The next
8 day, police received an anonymous tip that led to their discovery of
9 evidence implicating Pre as Rose's assailant.

10 Several years after the attack, the police arranged for Pre's
11 extradition to San Diego for prosecution; he arrived late in the evening on
12 January 18, 2002. At that time, the police conducted a videotaped
13 interview with him. At the outset of the interview, the officers advised
14 Pre of his *Miranda* rights; although Pre initially told the officers that he did
15 not understand their advisements that his statements could be used
16 against him and that he was entitled to the presence of an attorney, upon
17 further explanation, Pre indicated that he understood those rights and was
18 nonetheless willing to talk to the officers about the incident. Thereafter,
19 he told the officers that he had taken drugs on the date of the attack and
20 did not remember much of what happened, although he recalled going to
21 the apartment, hurting the victim by hitting her with a bar-type
22 instrument, choking her until she fell to the floor, getting kicked by her
23 and taking her purse.

24 (Lodgment 5.) On July 22, 2002, a jury convicted Petitioner in San Diego County
25 Superior Court of attempted voluntary manslaughter, mayhem, torture, robbery, and
26 burglary. (Lodgment 1.)

27 On August 30, 2002, Petitioner was sentenced to a life term plus thirteen years
28 and four months in state prison. (*Id.* at 173-74, 200.) Thereafter, Petitioner appealed
his conviction to the Fourth District Court of Appeal, Division One, where the
judgment was affirmed. (Lodgment 3, 4, 5.) Petitioner then filed a petition for review
in the California Supreme Court. (Lodgment 7.) On June 30, 2004, the California
Supreme Court denied Petitioner's petition for review. (*Id.*) On September 28, 2004
Petitioner's conviction became final when the 90-day period in which Petitioner could
have sought certiorari in the United States Supreme Court expired. See Bowden v.
Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999).

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1 On September 17, 2005,¹ 354 days after his conviction became final, Petitioner
 2 filed a state habeas petition in the San Diego County Superior Court, claiming
 3 ineffective assistance of trial counsel. (Lodgment 8.) The court denied the petition for
 4 failure to state a prima facie case for relief. (Lodgment 9, Exhibit A.) On March 16,
 5 2006, Petitioner filed a habeas corpus petition in the California Court of Appeal alleging
 6 ineffective assistance of both trial and appellate counsel, and abuse of discretion by the
 7 Superior Court by denying Petitioner's petition. (Lodgment 9.) Again, the petition was
 8 denied. (*Id.*) On October 10, 2006, Petitioner filed a habeas corpus petition in the
 9 California Supreme Court with the same allegations. (Lodgment 11.) On April 18,
 10 2007, the California Supreme Court denied his petition, and Petitioner's state habeas
 11 rights were thus exhausted. (Lodgment 12.)

12 On May 16, 2007, Petitioner commenced these federal habeas proceedings. On
 13 November 29, 2007, the Court declined to adopt the magistrate judge's report and
 14 recommendation and determined that Petitioner's petition was timely filed. (Doc. No.
 15 11.) On February 11, 2008, Respondent filed his response, and on April 2, 2008,
 16 Petitioner filed a traverse. (Doc. Nos. 14, 17.)

17 18 II. LEGAL STANDARD

19 A federal court may grant a habeas petition if it shows the applicant is in custody
 20 "in violation of the Constitution or other laws or treaties of the United States." 28
 21 U.S.C. § 2254(a). State interpretation of state laws and rules cannot serve as the basis
 22 for a federal habeas petition, as no federal or constitutional question would be
 23 implicated. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Habeas petitions are governed
 24 by the provisions of the 1996 Antiterrorism and Effective Death Penalty Act
 25

26 ¹Because Petitioner signed proof of service by mail on the petition for a writ of habeas
 27 corpus on September 17, 2005 (Lodgment 8), he is properly afforded the "mailbox rule." See
 28 *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003) (holding under the 'mailbox rule',
 a "pro se prisoner's filing of a state habeas petition is deemed filed at the moment the prison
 delivers it to prison authorities for forwarding to the clerk of the court."). On September 22,
 2005, the petition was filed in San Diego Superior Court. (Lodgment 8.)

1 ("AEDPA"). Pursuant to AEDPA, a federal court may grant habeas corpus relief from
2 a state court judgment only if the adjudication was (1) contrary to, or involved an
3 unreasonable application of, clearly established federal law, or (2) was based on an
4 unreasonable determination of the facts in light of the evidence presented in the state
5 court proceedings. 28 U.S.C. § 2254(d); Early v. Packer, 537 U.S. 3, 7-8 (2002).

6 A state-court decision is "contrary to clearly established federal law" if it (1)
7 applies a rule that contradicts the governing law set forth in Supreme Court cases, or
8 (2) confronts a set of facts that are materially indistinguishable from a decision of the
9 Supreme Court and nevertheless arrives at the opposite result. Williams v. Taylor, 529
10 U.S. 362, 405 (2000). A state-court decision is an unreasonable application of the
11 facts "if the state court identifies the correct governing legal principle from [the
12 Supreme Court's] decisions but unreasonably applies that principle to the facts of the
13 prisoner's case. Id. at 413.

14 15 III. DISCUSSION

16 Petitioner alleges four grounds for habeas corpus relief: (1) his due process rights
17 were violated because there was insufficient evidence to support his torture conviction,
18 (2) he was deprived of effective assistance of trial counsel, (3) he was deprived of
19 effective assistance of appellate counsel, and (4) the superior court deprived him of his
20 right to due process and abused its discretion by summarily denying his habeas corpus
21 petition. (*Petition* at 6-9(A).) Respondent contends that Petitioner fails to demonstrate
22 that the state court's rejection of his claims were an unreasonable application, or
23 contrary to, controlling United States Supreme Court law. (*Response* at p. 5.) For the
24 following reasons, the Court agrees with Respondent.

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1 **A. Petitioner Fails to Show That the Evidence Presented at Trial Does**
 2 **Not Support his Conviction**

3 The California Court of Appeal for the Fourth District, Division One, affirmed
 4 Petitioner's torture conviction based on its conclusion that the record contained
 5 substantial evidence to support the conviction. (People v. Pre, No. D040874, slip op.
 6 at 21.) The Court agrees.

7 In his Traverse, Petitioner reiterates the same arguments made to the Court of
 8 Appeal and in his instant Petition. Specifically, Petitioner argues that his actions
 9 against the victim do not show that he intended to cause cruel or extreme pain.
 10 (Traverse at 6.) Petitioner argues that the struggle that took place at the beginning of
 11 the attack proves that Petitioner intended a battery and assault on the victim, but the
 12 actions did not rise to the level of torture. (*Id.* at 5.) Petitioner also argues that what
 13 took place while the victim was unconscious is mere conjecture and cannot be used to
 14 support a conviction of torture. (*Id.* at 5.) Further, Petitioner dismisses the moment
 15 when the victim awoke to find him holding her and biting her ear as insufficient to
 16 prove intent to cause cruel or extreme pain. (*Id.* at 6.) Overall, Petitioner argues that
 17 a reasonable jury would be unable to find the specific intent to cause cruel or extreme
 18 pain to support a torture conviction. (*Id.*)

19 California law defines torture as "every person who, with the intent to cause cruel
 20 or extreme pain for the purpose of revenge, extortion, persuasion, or for any sadistic
 21 purpose, inflicts bodily injury as defined in Section 12022.7 upon the person of another,
 22 is guilty of torture." Cal. Pen. Code § 206.

23 In a federal habeas claim, the relevant inquiry in evaluating a sufficiency of the
 24 evidence claim is whether, "after viewing the evidence in the light most favorable to the
 25 prosecution, any rational trier of fact could have found the essential elements of the
 26 crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The
 27 Ninth Circuit has further recognized that after "AEDPA, we apply the standards of
 28 Jackson with an additional layer of deference." Juan H. v. Allen, 408 F.3d 1262, 1274

1 (9th Cir. 2005).

2 Under this standard, the Court concludes that the California Court of Appeal's
3 determination was not unreasonable. Viewed in the light most favorable to the
4 prosecution, the facts are sufficient for a reasonable trier of fact to find Petitioner guilty
5 of torture within the meaning of California Penal Code section 206. Not only did
6 Petitioner cause such damage to the victim as to require her to receive numerous
7 stitches, but his actions were sufficiently egregious. Petitioner nearly bit the victim's ear
8 off, and the attack lasted long enough for Petitioner to twice choke the victim into
9 unconsciousness. Under the deferential standard, the California Court of Appeal's
10 determination that the evidence was sufficient to support the conviction was not
11 contrary to U.S. Supreme Court authority, and was not based on an unreasonable
12 determination of the facts.

13 This Court is not called to decide whether it agrees with the state court's decision
14 or whether it would have reached the same conclusion; rather, the Court inquires only
15 whether the state court's decision was objectively unreasonable. Yarborough v. Gentry,
16 540 U.S. 1, 5 (2003). Based on the record, the Court finds Petitioner has failed to show
17 that the state court's determination was objectively unreasonable. Accordingly, the
18 Court **DENIES** Petitioner's sufficiency of the evidence claim.

19
20 **B. Petitioner Did Not Receive Ineffective Assistance of Trial or Appellate**
21 **Counsel.**

22 Petitioner alleges that both his trial and appellate counsels provided him with
23 ineffective assistance. Specifically, Petitioner argues that his trial counsel's performance
24 was deficient because: (1) she did not conduct a thorough investigation of the facts
25 surrounding the charges and possible defenses; (2) she did not adequately consult
26 petitioner and inform him of important issues and decisions regarding his defense; (3)
27 she failed to object to the trial court's response to jury question number three; and (4)
28 she failed to develop a viable defense strategy. (*Petition* at 7-7D.) Further, Petitioner

1 argues that appellate counsel did not "raise and/or adequately preserve meritorious
2 issues in appellate proceedings," and his actions fell below the objective standard of
3 reasonableness. (*Petition* at 8.) The Court disagrees.

4
5 **i. Two of Petitioner's Ineffective Assistance Claims Were Not**
6 **Properly Exhausted in State Court.**

7 The Court first addresses the issue of whether two of Petitioner's claims against
8 trial counsel were properly exhausted in state court. (*Response* at 11.) According to
9 Respondent, Petitioner's claims that trial counsel failed to consult with Petitioner
10 regarding his defense and failed to develop a viable defense strategy were not first raised
11 in the state court. (*Response* at 11.)

12 The Court cannot grant federal habeas corpus relief unless the claims were
13 exhausted in state court. 28 U.S.C. § 2254(b); Rose v. Lundy, 455 U.S. 509, 521
14 (1982). A state's highest court must have disposed of the claim on its merits in order
15 to exhaust state court remedies for that claim. Anderson v. Harless, 459 U.S. 4, 6-8
16 (1982). Petitioner must have presented the same legal claim and factual basis to the
17 state court before he can present it to the federal court. Gray v. Netherlands, 518 U.S.
18 152, 163 (1996).

19 Here, Respondent argues that Petitioner failed to properly exhaust his claims that
20 trial counsel failed to properly consult Petitioner, and trial counsel did not develop a
21 viable defense. (*Response* at 10-11.) Petitioner does not adequately address this issue
22 in his Traverse. Petitioner merely states that the claims were properly exhausted and
23 reverts to his original three arguments, which were properly exhausted in state court.
24 (*Traverse* at 2, 8.) However, there is no record of Petitioner exhausting these issues at
25 the state level. Because Petitioner fails to show that he exhausted his second and
26 fourth ineffective assistance issues in state court, the Court agrees that Petitioner failed
27 to properly exhaust his state court remedies with regards to issues two and four.
28 Accordingly, the Court **DENIES** Petitioner's claims on those issues.

1 ii. Petitioner's Remaining Claims Against Trial Counsel are
2 Without Merit.

3 Petitioner also claims that trial counsel failed to adequately investigate the facts
4 surrounding the charges and possible defenses, and trial counsel failed to object to the
5 trial court's response to jury question number three. (*Petition* at 7-7(B).) Respondent
6 argues that Petitioner failed to present evidence to support these claims. (*Response* at
7 13.)

8 Petitioner must identify the specific unreasonable acts or omissions of
9 counsel—he cannot rely solely on conclusory allegations. Strickland, 466 U.S. at 690;
10 Shah v. United States, 878 F.2d 1156, 1161 (9th Cir. 1989). In effect, Petitioner must
11 clearly establish that counsel's performance was so deficient that it fell below an
12 objective standard of reasonableness. Strickland, 466 U.S. at 687. Because attorney
13 actions are usually based on informed strategic choices, judicial scrutiny of an attorney's
14 performance must be highly deferential. Strickland, 466 U.S. at 689. Therefore, courts
15 will "indulge a strong presumption that counsel's conduct falls within the wide range
16 of reasonable professional assistance." Id.

17 Petitioner fails to present adequate evidence that his trial counsel's performance
18 fell below an objective standard of reasonableness. Petitioner's claim that his trial
19 counsel failed to adequately conduct a thorough investigation is not supported by
20 evidence; rather, it is a conclusory allegation. Although Petitioner bluntly states that
21 trial counsel failed to interview the victim and was deficient in cross-examining her as
22 a result, (*Petition* at 7), Petitioner fails to show exactly how this action falls outside of
23 the scope of objective reasonableness.

24 Further, Petitioner argues that trial counsel's deficiency for failing to object to the
25 superior court's response to jury question number three undermines confidence in the
26 outcome. (*Petition* at 7(A).) In its third question, the jury sent a note to the judge
27 asking "[c]an we conclude that the defendant under voluntary intoxication was able to
28 form the specific intent to commit the theft but not able to form the specific intent to
torture?" (Lodgement 5 at 11.) The judge responded by stating: "I cannot answer your

1 question directly for I would be flirting with the facts[,] which I cannot do since that
2 is your function. [¶] You will have to refer to the applicable instructions and apply
3 common sense.” (Id.) Petitioner again fails to show that trial counsel’s lack of
4 objection was outside the objective standard of reasonableness.

5 Petitioner establishes no reason why his attorney’s decision not to interview the
6 victim and not to object to jury question number three should be viewed as anything
7 other than a reasonable tactical decision. Strickland, 466 U.S. at 689. Accordingly,
8 Petitioner has failed to satisfy his burden of proving that his counsel’s performance was
9 deficient. Strickland, 466 U.S. at 687.

10 This Court is not called to decide whether it agrees with the state court’s decision
11 or whether it would have reached the same conclusion; rather, the Court inquires only
12 whether the state court’s decision was objectively unreasonable. Yarborough v. Gentry,
13 540 U.S. 1, 5 (2003). Based on the record, the Court finds Petitioner has failed to show
14 that the state court’s determination was objectively unreasonable. Accordingly, the
15 Court **DENIES** Petitioner’s ineffective assistance of trial counsel claims.

16
17 **iii. Petitioner Did Not Receive Ineffective Assistance of Appellate**
18 **Counsel.**

19 Petitioner claims that appellate counsel was ineffective because appellate counsel
20 failed to raise appropriate issues on appeal. Specifically, Petitioner argues that appellate
21 counsel failed to properly evaluate trial counsel’s ineffective performance. (*Petition* at
22 8.) However, Petitioner’s claim is premised on a valid claim of ineffective assistance of
23 trial counsel. Because the Court finds that Petitioner’s sole basis for ineffective
24 assistance of trial counsel is gone, Petitioner has not stated a valid claim for ineffective
25 assistance of appellate counsel. Accordingly, Petitioner has failed to satisfy his burden
26 of showing that his appellate counsel’s performance was deficient and the Court must
27 **DENY** this claim. Strickland, 466 U.S. at 687.

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